in the

Supreme Court

of the

United States

OCTOBER TERM, 1977

NO. 77-1056

SUNBEAM TELEVISION CORPORATION,
and
THE MIAMI HERALD PUBLISHING COMPANY,
Appellants,

vs.

ROBERT L. SHEVIN, As Attorney General,
and
RICHARD E. GERSTEIN, as State Attorney,
Appellees.

On Appeal from the Supreme Court of Florida

JURISDICTIONAL STATEMENT

Parker D. Thomson
Paul & Thomson
1300 Southeast First
National Bank Building
Miami, Florida 33131
Attorneys for Appellant,
The Miami Herald
Publishing Company

Allan Milledge
Alan Rosenthal
Milledge & Hermelee
2699 South Bayshore Drive
Miami, Florida 33133
Attorneys for Appellant,
Sunbeam Television
Corporation

TABLE OF CONTENTS

APPENDIX

TABLE OF CITATIONS

TABLE OF CITATIONS (Continued)

in the

Supreme Court

of the

United States

OCTOBER TERM, 1977

NO.

SUNBEAM TELEVISION CORPORATION,
and
THE MIAMI HERALD PUBLISHING COMPANY,
Appellants

vs.

ROBERT L. SHEVIN, as Attorney General,
and
RICHARD E. GERSTEIN, as State Attorney,
Appellees.

On Appeal from the Supreme Court of Florida

JURISDICTIONAL STATEMENT

Appellants, Sunbeam Television Corporation and The Miami Herald Publishing Company, appeal from

the judgment of the Supreme Court of Florida entered on October 28, 1977, which reversed a decision of the Circuit Court of Dade County, Florida, and upheld the constitutionality of Section 934.03(2)(d), Florida Statutes. This Jurisdictional Statement is submitted to show that the United States Supreme Court has jurisdiction of this Appeal and that substantial constitutional questions are presented which merit review by this Court.

REFERENCE TO OPINIONS BELOW

The opinion of the Florida Supreme Court dated October 28, 1977, is reported at 351 So.2d 723. The opinion of the Circuit Court of Dade County is reported at 45 Fla.Supp. 53. Copies of these opinions are included in the Appendix to this Statement.

STATEMENT OF GROUNDS FOR JURISDICTION

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. §1257(2). The judgment of the Florida Supreme Court, under appeal, reversed a decision of the Circuit Court for the Eleventh Judicial Circuit of Florida which held Section 934.03(2)(d), Florida Statutes, to be in violation of the First and Fourteenth Amendments to the United States Constitution. Although the Florida Supreme Court remanded this case to the trial court for further proceedings, the opinion and judgment of the Supreme Court of Florida are final for purposes of 28 U.S.C. §1257(2). The Florida Supreme Court conclusively decided the controlling constitutional issue, and its decision, which is binding upon the trial court, is therefore reviewable by this

Court. See: *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

On January 10, 1978, Sunbeam Television Corporation and The Miami Herald Publishing Company filed a Notice of Appeal to this Court from the judgment of the Florida Supreme Court dated October 28, 1977. A copy of the Notice of Appeal is included in the Appendix to this Statement.

QUESTION PRESENTED

Does Section 934.03(2)(d), Florida Statutes, abridge freedom of the press and due process of law in violation of the First and Fourteenth Amendments to the United States Constitution, by prohibiting, under criminal sanctions, the electronic recording of news interviews without the prior consent of all parties to said interview?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

The Fourteenth Amendment to the United States Constitution provides, in part:

". . . No State shall . . . deprive any person of life, liberty or property, without due process of law . . ."

The principal statute involved in this case is the Florida Security of Communications Act, Chapter 934, Florida Statutes, the relevant portions of which are:

§934.03(1)

> Except as otherwise specifically provided in this chapter, any person who:
>
> (a) Willfully intercepts, endeavors to intercept, or procure any other person to intercept or endeavor to intercept any wire or oral communications . . . shall be guilty of a felony of the third degree.
>
> (c) Willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection.

§934.03(2)(d)

> It is lawful under this chapter for a person to intercept a wire or oral communication where all of the parties to the communication have given prior consent to such interception."

§934.02(2)

> 'Oral communication' means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation and does not mean any public oral communication uttered at a public meeting.

§934.02(3)

> 'Intercept' means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

The Appendix to this Statement contains the Florida Security of Communications Act as it was adopted in 1969, the 1974 Amendment thereto, and the Act as amended.

STATEMENT OF THE CASE

Sunbeam Television Corporation operates a television broadcasting station in Miami, Florida, on Channel 7, WCKT, and The Miami Herald Publishing Company publishes The Miami Herald, a newspaper of general circulation in Miami, Florida. For many years, reporters for Sunbeam and The Miami Herald have, in a variety of circumstances, employed recording equipment for the purpose of preserving conversations which take place during their newsgathering activities.

Prior to October, 1974, The Florida Security of Communications Act, Chapter 934, Florida Statutes, adopted in 1969, prohibited the recording of conversations in which *no party* to the conversation gave consent. It prohibited the practices commonly called "wiretapping" and "bugging" and was modeled on and derived from Title III of the Omnibus Crime Control Act of 1968 (18 U.S.C. §2510 to §2525). Its terms, concepts and operative language were the same as the Federal Act. It prohibited "interception" of " oral communications" by "electronic devices". It did not prohibit a person from recording a conversation to which he was a party.

In 1974, Chapter 934 was amended by Florida Senate Bill 459. The Amendment (§934.03(2)(d), F.S.) requires the prior consent of *all* parties to a conversation before that conversation may be recorded. By prohibiting one party consensual recording, the 1974 Amendment has forced appellants and other media to discontinue the use of concealed recording equipment.

Sunbeam and The Miami Herald brought this action in the Circuit Court for Dade County, Florida, asserting that the 1974 Amendment unconstitutionally impairs newsgathering activities and constitutes a prior restraint in violation of the First Amendment of the United States Constitution. The defendants are the Attorney General of Florida and the State Attorney for the Eleventh Judicial Circuit of Florida.

An evidentiary hearing was held by the Circuit Court on January 7, 1977, at which a variety of prominent journalists and management personnel testified. Excerpts from six television series were introduced into evidence. The evidence demonstrated and, the trial

court found, . . . "that many stories of great public interest could not have been published save for the use of concealed or unannounced electronic recording devices".[1] Accordingly, the Dade County Circuit Court found the Amendment to the statute unconstitutional and enjoined its enforcement.

The Attorney General of Florida promptly appealed to the Florida Supreme Court asserting on the one hand that the statute as amended was constitutional and on the other hand, that the statute did not apply to the situations presented to the trial court because no expectation of privacy was involved in those situations. The Florida Supreme Court reversed the trial court and found the Florida statute to be constitutional. This appeal followed.

THE QUESTIONS ARE SUBSTANTIAL

I. The First Amendment Interests are Significant

Sunbeam Television Corporation and The Miami Herald both gather and present news to the public on a daily basis and both utilize investigative reporting in seeking information.

Investigative reporting typically is used to uncover consumer fraud, official corruption, and other forms of conduct in which the public is being cheated, misled or otherwise harmed. The existence of the undesirable conduct, in these circumstances, often turns on the precise words used by the persons involved. Perhaps as often it

[1]Opinion of Dade County Circuit Court, Appendix B hereto, Page App. 13.

depends on the tone, which may make innocent words sinister, or the reverse. Accordingly, appellants, and other media, have employed recording equipment concealed on their reporters for the purpose of preserving the conversations taking place during these types of investigations.

1. *Uses of Concealed Recording*

Sunbeam has performed many series utilizing concealed recordings. Presented during the evidentiary hearing were excerpts of four of those series, and two series which had been aired by WTVJ, Channel 4, Miami. These reports involved investigations into such areas as consumer fraud relating to unnecessary automobile repairs, housing discrimination, performing of unnecessary abortions by unlicensed individuals, and official corruption involving the integrity of local policemen.

Housing Discrimination Series

In this investigation, a black reporter and a white reporter for Sunbeam visited area apartment houses and complexes that had signs visible from the street indicating that apartments were for rent. Equipped with the recording equipment, the black reporter went to see the manager of each building with respect to renting an apartment and was followed to the same building approximately an hour later by the white reporter. Each reporter was equipped with a concealed recording mechanism to preserve the conversations. The result of the investigation indicated that many apartments which were immediately available to the white reporter were denied to the black reporter, evidencing a pattern

of discrimination in rental apartments in the Miami area. This series received *The Edward R. Murrow Documentary Award.*

Abortion Series

In this investigation, several female Sunbeam reporters, none of whom were pregnant, visited area abortion clinics. Each reporter carried concealed recording equipment. Reporters who were told they were pregnant or might be pregnant were examined by a gynecologist the same day to verify that they were not pregnant. The results of the series indicated that unnecessary abortions were being performed in at least three out of eight advertised abortion clinics. The documented charges secured by the tape recordings of conversations between the reporters and personnel at the clinics led to investigations by the State Attorney, State Board of Medical Examiners and the Florida Department of Professional and Occupational Examiners.

For this series, Sunbeam won the so-called "Triple Crown" of broadcasting journalism: *The George Foster Peabody Award,* the *Sigma Delta Chi Distinguished Service Award* and the *National Headliner Club Award.* Other awards for this series included: *Scripps-Howard Foundation Public Service Award, Broadcast Media Award* — San Francisco State College, *Florida Bar Association Grand Prize,* and the *Florida Associated Press Award* for outstanding investigative reporting.

Auto Repair Series

In this investigation, ten randomly selected Miami area service stations were checked in an effort to determine how each would repair a minor malfunction, as well as how much would be charged for the work performed. The Sunbeam reporter was equipped with a hidden recorder for the purpose of preserving the conversations between the reporter and the mechanics. Sunbeam received five major awards in recognition of the "Auto Repair Rip-Off" Series: *Broadcast Media Award* by San Francisco State College; *Distinguished Service Award* and *Bronze Medallion* by National Sigma Delta Chi; *Alfred P. Sloan TV Award; Florida Bar Association Media Award;* and *Green Eye Shade Award* by Sigma Delta Chi, Atlanta Professional Chapter.

Wallet Series

In this investigation, marked purses or wallets were taken by Sunbeam reporters to policemen on the street who were told that the wallet or purse had been found and was being returned to the police for forwarding to the proper owner. Hidden recording equipment and cameras recorded each instance of a returned wallet. Over 30% of the purses and wallets were never returned to the stationhouse by the policemen.

This series received the *Florida Bar Association First Prize Special Award* for investigative reporting as well as the *Florida Associated Press Award* and the *Scripps-Howard Foundation Award.*

Examples of investigations in which The Miami Herald utilized unannounced tape recordings include the following:

Pitts-Lee Case

During the investigation of the famous Pitts-Lee case, reporter Gene Miller recorded crucial interviews with the late J. Frank Adams, a Panhandle State Attorney, the late M. J. (Doc) Daffin, Sheriff of Bay County, Florida, S. R. (Speedy) DeWitt, an investigator in the Florida Attorney General's office, Joe B. McCawley, a state-hired courtroom hypnotist, and two Assistant Attorneys General, George Georgieff and Raymond L. Markey, all of whom had professed opinions of guilt concerning Pitts and Lee, later pardoned fully by the State of Florida. That investigation led to the awarding of the *Pulitzer Prize* for general local reporting to Gene Miller in 1976.

Kent State

Telephone interviews of Ohio National Guardsmen concerning the killing of four students at Kent State University in 1970 were recorded. That investigation won the national *George Polk Award* for Knight Newspapers, Inc.

Mackle Kidnapping

Interviews conducted during the Barbara Mackle kidnapping case were recorded to insure that no inaccurate information would be published which might endanger the victim.

FHA Fraud

Investigation of widespread wrongdoing within the Federal Housing Administration's low income housing

program in Florida required unannounced recording to accurately detail evidence of official corruption, leading to reform of the program and conviction of several persons.

2. *Elements*

There are three elements which necessitate the use of concealed recording equipment in these types of investigative reporting: accuracy, candidness of person interviewed, and corroboration.

The element of accuracy is absolutely essential for many reasons: in the interest of the individual subject that he not be harmed by an untruth, in the interest of the public generally that the news be a fair portrayal of fact; in the interest of the broadcaster or publisher that its programs be accurate, meaningful, and of high quality; in the interest of the broadcaster or publisher that it be able to establish the truth with precision to whomever is concerned — associates of the perpetrator who tend to disbelieve his wrongdoing — the employer of the perpetrator whose reputation may also be at stake — his attorney — a court if the lawsuit ensues — the Federal Communications Commission if unfairness or other charges are made.

It was suggested by Appellees in the courts below that accuracy in investigative reporting could be achieved by methods other than recording. The record, however, established that recording was the only effective means of obtaining fair and accurate reporting in those situations where words and manner of speech were significant to the investigation.

> ". . . No matter how good the reporter, no matter how much experience he has, no matter how good his memory, he can never remember precisely word for word what someone has told him in a conversation, and recording is the only way to be fair." Testimony of Clarence Jones, Investigative Reporter for Post-Newsweek Station of Florida, Inc. (WPLG, Channel 10)

Ultimately, it is a management decision as to whether an investigative report is to be published or broadcast.

> "It is essential . . . that [management] verify the accuracy of our reporting . . . [T]he knowledge that we will be able to report accurately is critical to the decision to go ahead with the investigation". Testimony of Edmund N. Ansin, President and General Manager of Sunbeam.

* * *

> ". . . . it would be irresponsible on our part [to publish certain types of investigative reports without use of concealed recorders] because we would be in the position of possibly damaging severely the professional reputation of somebody." Testimony of Richard Wolfson, Executive Vice President of Wometco Enterprises, Inc. (WTVJ, Channel 4), Miami.

The element of candidness relates to the need to record a conversation without the prior consent of the person being interviewed.

"It has indeed been the experience of our reporters . . . to learn, when they must inform someone that they are taping a call, that the party they are speaking to tends to become a more reluctant . . . interviewee, and is, in effect, chilled, less inclined to speak." Testimony of Steve Rogers, The Miami Herald.

The record, based upon the witnesses' many years of reporting experience, established that persons engaged in unlawful or undesirable conduct will not speak candidly if they know that their words are being recorded.

". . . We cannot accurately report what a salesman says to his customer if we tell the salesman that we are newsmen. If we tell the salesmen that we are lawyers, or investigators for a consumer fraud agency, he will change his pitch, so to accurately get what the salesman is saying . . . in the consumer fraud cases, he needs to believe that we are the run of the mill customer, and that is the only way we will get an accurate representation of what the salesman says to the average member of the public that he approaches.

The same is true in the corruption cases. Corrupt officials often become very holy when they speak to reporters, or to lawyers, or other law enforcement agencies, and it is only when they deal with the gambler, the pimp, the prostitute that they will be themselves, and there we can only make that story if the conversation is recorded." Testimony of Clarence Jones.

The investigative reports presented to the trial court as well as others which have utilized concealed recording could not have been made without such recording. If no corroboration of the information gathered was available other than the notes or memory of the reporter, the news resulting from the investigation could not be published.

"We look for corroboration. If there were no corroboration, we obviously couldn't run it. If the series was of a nature where things were of public record, and we had copies of the public records, of course, we would rely upon that information. If the series relied merely upon things that were said to the reporter, and the reporter had no corroboration of those things, we would not run the series." Testimony of Edmund N. Ansin.

* * *

"Q. (To Richard Wolfson by Mr. Whisenand, Assistant Attorney General) So, in your opinion, as General Counsel for the television station, it would be your advice, or has been on occasion, not to run that type of series without some type of tape recording, or electronic recording of the actual conversations?
A. That's right." Testimony of Richard Wolfson.

The record established that the only effective corroboration of some news stories is the recording of the conversation. It is only with a recording that the exact words, manner of speech, and inflection can be pre-

served, which aspects of an interview are often essential to accurately portray the news story.

II. The Privacy Interest Claimed by Florida is Unprecedented

Florida has, by the statute in issue and the opinion interpreting the statute, claimed a privacy interest of unprecedented breadth and scope.[2]

The statute forbids the electronic recording of any conversation by any participant unless *all* parties to the conversation give their consent. The statute has no locational limitation, i.e., home or office, nor any content limitation. As interpreted by the Florida Supreme Court, its prohibition applies to any conversation anywhere.

The only explanation of the state interest involved was given by the Florida Supreme Court:

> "This was a policy decision of the Florida Legislature to allow each party to a conversation to have an expectation of privacy from interception by another party to the conversation." 351 So.2d at 726-727.

Such an explanation is not very helpful. Whatever else may be said, the Florida Supreme Court was explicitly

[2]Privacy rights have heretofore been limited, particularly when in conflict with First Amendment freedoms. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, reh. den. 414 U.S. 881 (1973); See also: *United States v. Miller* _____U.S._____, 96 S.Ct. 1619 (1976); *Roe v. Wade*, 410 U.S. 113, reh. den. 410 U.S. 959 (1973); *Stanley v. Georgia*, 394 U.S. 557 (1969).

aware that such a policy would prohibit the publication of investigative reports of the type which had won The Pulitzer Prize, The George Foster Peabody Award and The Florida Bar Grand Prize. Accordingly, the Court deemed it necessary to put "the dignity of man" in the balance.[3]

One illustration of news gathering in evidence in this case involved housing discrimination. According to the Florida Supreme Court's interpretation, a landlord engaged in systematic racial discrimination is entitled to an expectation of privacy when uttering lies to prospective black tenants. Why such lies should be protected from effective exposure in the press is not analyzed by the Florida Court, nor is the landlord's privacy interest made apparent.

The original purpose of the Florida Security of Communications Act as described in the legislative findings (§934.01, F.S.) was:

> "(4) To safeguard the privacy of innocent persons . . ."

It did so by prohibiting "bugging" and "wiretapping" by persons not parties to a communication. However, the 1974 Amendment to Chapter 934 prohibits "interception" of communications unless *all* parties give prior consent thereto. This Amendment is incomprehensible in the context of a two party conversation. How can one

[3]"A different rule could have a most pernicious influence upon the dignity of man". 351 at 727. It might be said that any case of first impression in which the opposing interests are the dignity of man and First Amendment freedoms must involve substantial constitutional issues.

"intercept" his own conversation? The term "intercept" has a perfectly clear meaning in the Federal Act and had a clear meaning in the Florida Act prior to the 1974 Amendment.

The obvious difference between the interception of a conversation by a stranger to the conversation and recording by a participant to the conversation is explored in the case law. *Katz v. U.S.*, 389 U.S. 347 (1967) and *Rathbun v. U.S.*, 355 U.S. 107 (1957). When a third party interception is involved, the question of whether there has been a violation of the right to privacy turns on whether the party who has been intercepted has "a reasonable expectation of privacy." *Katz v. U.S., supra.* This standard is embodied in Section 934.02, Florida Statutes. Although this standard is manageable in the context of third party interception, it becomes meaningless in the context of conversations between two parties.

In most two-party conversations, one party has no reasonable expectation that the contents of the conversation will not be repeated by the other. In those instances, no invasion of privacy occurs as a result of recording the conversation by a person who is a party thereto. The leading case on this point is *Rathbun v. United States,* 355 U.S. 107 (1957). In that case, the issue was whether the overhearing of a telephone conversation on an extension line constituted an interception within the meaning of the Federal Communications Act. The Court held:

> "Common experience tells us that a call to a particular telephone number may cause the bell to ring in more than one ordinarily used instrument. Each party to a telephone conversation takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation. When such takes place there has been *no violation of any privacy of which the parties may complain. Consequently . . . interception has not occurred.* 355 U.S. at 111. (Emphasis Added).

If one has no privacy interest in a particular conversation, then the means by which it is recalled, memory, pen and pad, or tape, is immaterial. As this Court said in *U.S. v. White,* 401 U.S. 745, 753 (1971).

> "[W]e are not prepared to hold that a defendant who has no constitutional right to exclude the informer's unaided testimony nonetheless has a Fourth Amendment privilege against a more accurate version of the events in question."

Whether or not the conversation is private in any sense is the issue, not the means[4] by which it is recalled.

The spectre of one's conversation being repeated in "living color and hi-fi to the public at large" is awesome indeed if it is a private conversation which takes place in one's home. (351 So.2d at 727). But when one is engaged in deliberately defrauding the public, may those conver-

[4]In the recent opinion in *U.S. v. New York Telephone,* U.S. ___, 98 S.Ct. 364 (1977), this Court referred to the legislative intent of the Federal act:

> "The proposed legislation is intended to protect the privacy of communications itself and not the means of communication." 98 S.Ct. at 370.

sations be immunized from effective recall by artificially characterizing such conversations as private?[5]

The Florida statute's privacy premise is even more suspect when one observes that electronic recording may be undertaken when "under the direction of a law enforcement officer". §934.03(2)(c), F.S. If privacy justifies the statute in all circumstances, how is the privacy interest lost because a policeman is interested in the conversation? The Florida Supreme Court recoils at the situation posed in the Dietemann case [*Dietemann v. Time*, 449 F.2d 255 (9th Cir. 1971)] but fails to note that in Florida, tape recording in another's home would be permissible if any law enforcement person authorized the recording. On the other hand, it is now illegal in Florida for a reporter conducting an interview with a public official about public business in a public place to tape record that conversation because the politician "should not be required to take the risk that what is heard . . . will be transmitted by . . . hi-fi to the public at large". 351 So.2d at 727. It is remarkable that the right to falsely deny what one has said can be characterized as an interest in privacy and then constitutionally elevated over the public's right to know.

[5]The Court of Appeals for the District of Columbia spoke to this point in *U.S. v. Mitchell*, ____F. 2d ____(D.C. Cir. 1976) 2 Med.L.Rptr. 1097. In considering Richard Nixon's privacy claim to the "Watergate tapes" in an action to gain public access to them, Judge Bazelon stated:

> "But even if preventing embarrassment may sometimes justify access restrictions, there is plainly no justification for such restrictions here. The tapes at issue are *not* recordings of bedroom or other intimate conversations, and the embarrassment Mr. Nixon fears is *not* republication of highly personal matter. Rather we deal with conversations between business associates . . ."
> 2 Med.L.Rptr. at 1105.

III. The Florida Statute Constitutes A Prior Restraint Contrary To The First Amendment And Is Justified By No Compelling State Interest.

Freedom of the press is a fundamental right secured for all Americans by the First Amendment to the United States Constitution. This Court has often emphasized the reasons for a free press:

> ". . . [The] administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasize the primary need for a vigilant and courageous press . . ." *Near v. Minnesota*, 283 U.S. 697, 719-720 (1931).

The validity of this statement remains strong today. However, one of the most effective means of carrying out the investigative responsibilities of a "vigilant" press is precluded by the Florida Supreme Court decision at issue here.

Although the First Amendment has, for many years, been held to preclude prior restraints on the dissemination of information, it is only in the last decade that this Court has ruled that the ability to gather infor-

mation should also be accorded constitutional protection:

> ". . . Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg v. Hayes,* 408 U.S. 665, 681 (1972).

When governmental action restrains the exercise of First Amendment freedoms, the traditional standards require that the substantive evil which necessitates the action be extremely serious, the degree of imminence extremely high, and the regulations narrowly specific and no broader than necessary to accomplish the desired goal. *NAACP v. Button,* 371 U.S. 415 (1963); *Shelton v. Tucker,* 364 U.S. 479 (1960); *Cantwell v. Connecticut,* 310 U.S. 296 (1940). The Florida Supreme Court has ignored these standards here.

The trial court found, on the evidence presented, that First Amendment freedoms were restrained by Section 934.03(2)(d), Florida Statutes, there was no state interest which was served by this application of the statute and that, it was vague and overbroad in its application. The court stated:

> "News gathering activities of the Plaintiffs have been substantially impaired by the prohibition in amended Chapter 934, Florida Statutes, of the use by reporters of concealed or unannounced electronic recordings." [App. 13].

and that:

> "No evidence was offered concerning any compelling state interest which would tend to justify [this] impairment of news gathering activities." [App. 13].

To avoid the application of any of the traditional First Amendment standards, the Florida Supreme Court chose to categorize the issues before them as presenting "access" problems. The Court, therefore, relied on, and accordingly misapplied the cases of *Pell v. Procunier,* 417 U.S. 817 (1974) and *Saxbe v. Washington Post Co.,* 417 U.S. 843 (1974).

The uniqueness of the question presented here underscores this misplaced reliance. *This is not an "access" case;* the information gathered during investigations utilizing concealed recorders was available to the individual reporter whether a recording device was used or not. The statute acts as a prior restraint because it precludes publication of the information already gathered.[6] Prohibiting the recording of information already available is like prohibiting the use of a sketch artist when a reporter with pad and pencil is allowed.[7] The testimony presented in the trial court clearly showed that the press is compelled to exercise self-censorship due to the risks of publishing uncorroborated or inaccurate information as to matters of great sensitivity.

---

[6]Such a prior restraint bears a heavy presumption against its constitutional validity. *Nebraska Press Assn. v. Stuart,* 427 U.S. 539 (1976); *New York Times v. United States,* 403 U.S. 713, 714 (1971).

[7]See: *United States v. Columbia Broadcasting System, Inc.,* 497 F.2d 102 (5th Cir. 1974).

Although the reporter may be certain of the significance of his interview, without a recording he presents second hand impressions to his editor. With a recording, the editor can evaluate the tone and nuances of the conversation.[8] The testimony revealed that in many circumstances the decision to publish, or sometimes even to continue an investigation, can only be made when a recording is available. Without the recording, the editor oftentimes must withhold the information gathered from dissemination.

The Florida Supreme Court did not take issue with the trial court's finding that many news stories of great public interest now could not be published. It appears to have treated this result as simply a permissible incidental burdening of the press.

The fact is clear: Without concealed electronic recording, certain stories could not be published. If there were a compelling reason to preclude the dissemination of such information, the court should then balance the respective interests involved. The First Amendment requires at least this much.

The Florida Supreme Court refused to acknowledge that electronic recording was an appropriate means of corroborating news which is gathered, thereby avoiding the need to balance the interests involved:

[8]"It is conceded that one who listens to the tapes — the inflections, pauses, emphasis and the like — will be better able to understand the conversations than one who only reads the written transcripts that already have been published." *U.S. v. Mitchell*, ___ F.2d ___, (D.C. Cir. 1976), 2 Med.L.Rptr. 1097.

> ". . . [H]idden mechanical contrivances are not indispensable tools of news gathering." 315 So.2d at 727.

The Court reasoned that "the ancient art of news gathering was successfully practiced long before the invention of electronic devices." 351 So.2d at 717. Yet radio, television and motion pictures have long been held to be included within the ambit of the First Amendment although their existence could not have been contemplated by the Framers. See: *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973); *Kingsley International Pictures Corp. v. Regents of University of New York State*, 360 U.S. 684 (1959); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

The Florida Supreme Court asserted that Sunbeam and The Miami Herald were relying on the right to gather news without governmental interference. 351 So.2d at 725. This statement is simply incorrect. Appellants have, in fact, asserted that the justification for the governmental interference created by Section 934.03(2)(d) fails to counterbalance the First Amendment considerations present here.

The case of *Branzburg v. Hayes*, 408 U.S. 665 (1972), was extensively cited by the Florida Supreme Court:

> ". . . It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. Under prior cases, otherwise *valid*

> *laws serving substantial public interests* may be enforced against the press as against others, despite the possible burden that may be imposed . . ." 351 So.2d at 726, citing *Branzburg, supra.*, 408 U.S. at 681-698. [Emphasis supplied.]

There was absolutely no showing in the trial court of *any* public interest served by the application of Section 934.03(2)(d), Florida Statutes, to the news gathering activities of appellants.

The significant value of concealed recording to investigative journalism has been amply demonstrated. Its necessity to the publication of certain news stories is equally clear. In the absence of justification for this impairment of press freedom, the statute is unconstitutional.

CONCLUSION

The application of the traditional standards for the evaluation of regulations which impair press or speech rights have never been more clearly required than in this case. Here Florida has attempted to reach a perceived evil, invasion of one's privacy, by outlawing a neutral means. Its refusal to limit the "means" prohibition to situations in which a substantive privacy interest is involved is a wholly unnecessary and unacceptable affront to the First Amendment. The questions presented by this appeal are substantial and have major implications for the public interest in freedom of the press.

It is respectfully requested that this Court note jurisdiction in this appeal and receive full briefs on the merits.

Respectfully submitted,

Parker D. Thomson

Paul & Thomson
1300 Southeast First
National Bank Building
Miami, Florida 33131
(305) 371-2000
Attorneys for Appellant,
The Miami Herald
Publishing Company

Allan Milledge

Alan Rosenthal

Milledge & Hermelee
2699 South Bayshore Drive
Miami, Florida 33133
(305) 858-5660
Attorneys for Appellant,
Sunbeam Television
Corporation

Appendix

APPENDIX A

IN THE SUPREME COURT OF FLORIDA

Robert L. SHEVIN, as Attorney General
and Richard E. Gerstein, as State Attorney,
Appellants,

v.

SUNBEAM TELEVISION CORPORATION and the
Miami Herald Publishing Company,
Appellees.

No. 50938.

Supreme Court of Florida.

Oct. 28, 1977.

ADKINS, Justice.

This is an interlocutory appeal from the Circuit Court of Dade County which held Section 934.03(2)(d), Florida Statutes, to be unconstitutional.

We have accepted jurisdiction and will treat the interlocutory appeal as a petition for writ of certiorari. *Burnsed v. Seaboard Coastline Ry. Co.*, 290 So.2d 13 (Fla.1974).

Section 934.03(2)(d), Florida Statutes (1969), permitted the interception of defined wire or oral communications when *one party* to the communication gave prior consent:

> "It is not unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication when such person is a party to the communication or when *one* of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal act." (Emphasis supplied.)

Section 934.03(2)(d), Florida Statutes, was amended in 1974, by Chapter 74-249 [S.459], Laws of Florida, to require *all parties* to the defined wire or oral communication to give prior consent to a defined interception:

> "It is lawful under this chapter for a person to intercept a wire or oral communication when *all* of the parties to the communication have given prior consent to such interception." (Emphasis supplied.)

Appellee Sunbeam Television Corporation is a television station in Miami, Florida, and the Miami Herald Publishing Company is a division of Knight-Ridder Newspapers, Inc., which publishes the Miami Herald, a newspaper of general circulation in the State of Florida.

The complaint was filed by Sunbeam alleging that the amendment impaired its news gathering dissemination activities and constituted a prior restraint in violation of the First Amendment. Sunbeam alleged that secret recordings during investigative reporting activities were necessary to insure the accuracy of the in-

formation gathered and to preserve the conversation. It was further alleged that the interests protected by the statute were interests in privacy, which are subordinate to their alleged First Amendment rights. The Miami Herald intervened as a party plaintiff.

Appellees say there are three basic elements which necessitate the use of concealed recording equipment in investigative reporting: accuracy; candidness of person interviewed; and corroboration. The element of accuracy, they say, is in the interest of the individual as well as the public generally, in that no one will be harmed by an untruth. Further, it is in the interest of the broadcaster or publisher that it be able to establish the truth with precision.

Appellees point out that persons engaged in unlawful or undesirable conduct will not speak candidly if they know that their words are being recorded.

Furthermore, if no corroboration of the information gathered was available other than the notes or memory of the reporter, the news resulting from the investigation could not be broadcast. The only effective corroboration of a news story is the recording of the conversation, where the exact words, manner of speech, and inflection can be preserved.

Testimony was produced displaying the value of concealed recordings in investigations of consumer fraud, housing discrimination, illegal abortion, corruption of officials, and various other matters. Appellees contend that the statute substantially impairs these types of news gathering activities.

Appellees do not claim any impairment of their freedom to publish. Instead, they rely on their right to gather news without governmental interference.

In *Pell v. Procunier*, 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974), a prison rule under attack prevented media representatives from conducting interviews with specific individual inmates. The media could, however, have full access to observe prison inmates through tours and had the right to speak to any inmate encountered and interview inmates selected at random by correctional officials. Inmates and media representatives challenge the rule by relying on their right to gather news without governmental interference. The United States Supreme Court concluded that the rule did affect news sources and news gathering activities, but did not violate any First Amendment rights of the press:

> "More particularly, the media plaintiffs assert that, despite the substantial access to California prisons and their inmates accorded representatives of the press—access broader than is accorded members of the public generally—face-to-face interviews with specifically designated inmates is such an effective and superior method of newsgathering that its curtailment amounts to unconstitutional state interference with a free press. We do not agree." At 833, 94 S.Ct. at 2809.

A similar factual situation existed in *Saxbe v. Washington Post Co.*, 417 U.S. 843, 94 S.Ct. 2811, 41 L.Ed.2d 514 (1974). In *Saxbe, supra*, the record con-

tained testimony to the effect that personal interviews were "indispensable to effective reporting." One witness testified this his experience with 1600 interviews clearly illustrated that the truth could only be gained from private one-to-one interviews. Even with this factual predicate the United States Supreme Court declined to accept any First Amendment violation asserted by the media.

Branzburg v. Hayes, 408 U.S 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972), concerned the rights of the media to have constitutionally protected confidential sources. The court required three reporters to appear before grand juries and to testify. The following appeared in the opinion:

"We do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated. But these cases involve no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold. No exaction or tax for the privilege of publishing, and no penalty, civil or criminal, related to the content of published material is at issue here. The use of confidential sources by the press is not forbidden or restricted; reporters remain free to seek news from any source by means within the law. No attempt is made to require the press to publish its sources of information or indiscriminately to disclose them on request.

"The sole issue before us is the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime. * * *

"It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. Under prior cases, otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed. * * *

"It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally. * * *

"We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do. * * *

"This conclusion itself involves no restraint on what newspapers may publish or on the type or quality of information reporters may seek to acquire, nor does it threaten the vast bulk of confidential relationships between reporters and their sources. * * *

"It would be frivolous to assert—and no one does in these cases—that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws. Although stealing documents or private wiretapping could provide newsworthy information, neither

reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news. Neither is immune, on First Amendment grounds, from testifying against the other, before the grand jury or at a criminal trial. The Amendment does not reach so far as to override the interest of the public in ensuring that neither reporter nor source is invading the rights of other citizens through reprehensible conduct forbidden to all other persons. * * *

"Neither are we now convinced that a virtually impenetrable constitutional shield, beyond legislative or judicial control, should be forged to protect a private system of informers operated by the press to report on criminal conduct, a system that would be unaccountable to the public, *would pose a threat to the citizen's justifiable expectations of privacy,* and would equally protect well-intentioned informants and those who for pay or otherwise betray their trust to their employer or associates. The public through its elected and appointed law enforcement officers regularly utilized informers, and in proper circumstances may assert a privilege against disclosing the identity of these informers." (Emphasis supplied.) At 681-98, 92 S.Ct. at 2656-2665.

Section 934.03(2)(d), Florida Statutes, is not a restraint or restriction on what the press may publish, nor is there an expressed or implied command that the press publish which it prefers to withhold. Nor does this case involve any intrusion upon speech or assembly. This was a policy decision by the Florida legislature to allow each party to a conversation to have an expectation of privacy from interception by another party to the conversation. It does not exclude any source from the press, intrude upon the activities of the news media in

contacting sources, prevent the parties to the communication from consenting to the recording, or restrict the publication of any information gained from the communication. First Amendment rights do not include a constitutional right to corroborate news gathering activities when the legislature has statutorily recognized the private rights of individuals.

In *Sigma Delta Chi v. Speaker, Maryland House of Delegates,* 270 Md. 1, 310 A.2d 156 (1973), the court affirmed the issuance of an injunction that prohibited reporters from attending sessions of the Maryland legislature with tape recorders in their possession. A rule of the legislature prohibited the use of cameras and recording instruments in the chambers without permission from the senate president or house speaker. The court recognized that news sources and news gathering were protected by the First Amendment, but rejected the assertion that the need of the news media to promote greater accuracy and speed in reporting was also within the protective purview of the First Amendment. The court said:

> "They merely claim that the use of tape recorders in each chamber will promote greater accuracy and speed in reporting. We are unwilling to include those purposes, however worthwhile they may be, within a constitutionally protected right to gather news. Thus, the exclusion of recording devices from the legislative sessions constitutes no abridgement of First Amendment rights." 310 A.2d at 159.

The protection of a person's general right to privacy is left largely to the states. *Katz v. United States,* 389 U.S. 347, 350, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

News gathering is an integral part of news dissemination, but hidden mechanical contrivances are not indispensable tools of news gathering. The ancient art of investigative reporting was successfully practiced long before the invention of electronic devices, so they cannot be said to be "indispensable tools of investigative reporting." The First Amendment is not a license to trespass or to intrude by electronic means into the sanctity of another's home or office. It does not become such a license simply because the person subjected to the intrusion is reasonably suspected of committing a crime.

This was the reasoning followed in *Dietemann v. Time, Inc.,* 449 F.2d 245 (9th Cir. 1971), where investigative reporters attempted to secure information concerning criminal violations in the practice of medicine. A reporter was wired to transmit conversations for recording and a photographer secretly took pictures. The alleged quack successfully sued the press representatives for damages to his "privacy." The court pointed out that a person should not be required to take the risk that what is heard and seen will be transmitted by photograph or recording in full living color and hi-fi to the public at large. A different rule could have a most pernicious effect upon the dignity of man.

We have considered other objections to the statute and find them without merit.

We have previously dissolved the temporary injunction. We now hold that the statute is constitutional in that is does not violate the First Amendment of the United States Constitution, nor is it vague, nor does it unlawfully chill First Amendment freedom.

The order of the trial court is quashed and the cause is remanded to the trial court for further proceedings consistent with these views.

It is so ordered.

OVERTON, C. J., and BOYD, ENGLAND, SUNDBERG and HATCHETT, JJ., concur.

APPENDIX B

SUNBEAM TELEVISION CORPORATION, et al.

v. SHEVIN, Attorney General, et al.

No. 76-39277.

Circuit Court, Dade County.

January 14, 1977.

45 Fla. Supp. 53

DONALD E. STONE, Circuit Judge.

Order on motions for temporary injunction: This cause came to be heard upon the motions of the plaintiffs, Sunbeam Television Corporation and the Miami Herald Publishing Company, for a temporary injunction against the enforcement of the 1974 Amendment to Chapter 934, Florida Statutes, and declaring said amendment to be an unconstitutional prior restraint upon certain news gathering activities formerly engaged in by reporters in the employ of the plaintiffs.

At the hearing on January 7, 1977, the court heard the testimony of reporters and senior management persons from the plaintiffs and from Wometco Enterprises and Post-Newsweek, operators of Miami television Channels 4 and 10, respectively. In addition, portions of four television series produced by Channel 7 (Sunbeam) and portions of two series produced by Channel 4 (Wometco) were received in evidence. The court also received an affidavit by Attorney General Shevin.

The court makes the following findings of fact and conclusions of law —

Findings of fact

1. The plaintiff, Sunbeam Television Corporation, is a commercial television station, licensed by the Federal Communications Commission, which broadcasts on Channel 7 in Miami, Florida.

2. The plaintiff, the Miami Herald Publishing Company, publishes the Miami Herald, a newspaper of general circulation in the state of Florida.

3. The defendant, Robert L. Shevin is the Attorney General of Florida, and the defendant, Richard E. Gerstein, is the State Attorney for the Eleventh Judicial Circuit of Florida.

4. Prior to October 1974, reporters for the plaintiff, Sunbeam, and other television broadcasters in Florida, and the plaintiff, the Miami Herald, made use of concealed or unannounced electronic recording in their investigative reporting and other news gathering activities. Typically reporters for the television stations have used recording devices concealed on the person of reporters in their "consumer" series. Typically newspaper reporters use the technique to record crucial interviews by telephone.

5. As a result of the amendment to Chapter 934, which became effective on October 1, 1974, the use of such news gathering techniques was discontinued by the plaintiffs subsequent to the enactment of the amendment.

6. The use by reporters of concealed or unannounced electronic recording equipment has been responsible for significant news gathering activities by plaintiffs in the past which resulted in many awards of recognition for outstanding public service.

7. The need for the use of concealed or unannounced electronic recording arises from a number of considerations which generally fall into the categories of *accuracy, candidness, and corroboration.* There can be no doubt that many stories of great public interest could not have been published save for the use of concealed or unannounced electronic recording devices.

8. No evidence was offered concerning any compelling state interest which would tend to justify the impairment of news gathering activities by the prohibition of concealed or unannounced electronic recording. Evidence was offered which tends to show that the 1974 Amendment to Chapter 934 significantly impairs law enforcement, as well as news gathering, and the court so finds.

9. News gathering activities of the plaintiffs have been substantially impaired by the prohibition in amended Chapter 934, Florida Statutes, of the use by reporters of concealed or unannounced electronic recordings.

Conclusions of law

1. Prior to October 1, 1974, the Florida Security of Communications Act, Chapter 934, Florida Statutes, made illegal electronic recording of conversations to which *no party* gave consent. The amendment to the Act

passed by the 1974 session of the Florida legislature, Chapter 74-249, makes it illegal to electronically record conversations unless *all parties* give prior consent. (§934.03(2)(d), F.S.) Certain terms of the statute now are almost meaningless when applied to a situation in which one party to a conversation is recording it without advising the other party, such as by referring to the recording activity as an "interception" and by describing the offending conduct as intruding upon an "expectation of privacy." However, it seems clear that the 1974 Amendment to §934.03(2)(d), particularly when considered with the amendment to §934.02, did purport to make illegal such electronic recordings.

2. Freedom of the press to seek out and to expose ills in our society is a fundamental right protected by the First Amendment to the United States Constitution. *Near v. Minnesota,* 283 U.S. 697 (1931); *U.S. v. Dickinson,* 465 F.2d 496 (5th Cir. 1972); *Miami Herald v. McIntosh,* Sup. Ct. of Fla., Case No. 48,264, July 30, 1976.

3. The broadcast media are equally within the First Amendment protections, *In Re: The Adoption of Proposed Local Rule 17,* 339 So.2d 181 (Fla. Sup. Ct. 1976), and news gathering activities are at the heart of First Amendment freedoms. *Lucy Morgan v. State,* 337 So.2d 951 (Fla. Sup. Ct. 1976); *In Re: The Adoption of Proposed Local Rule 17, supra.*

4. Even minor restrictions on First Amendment freedoms may be unconstitutional. "First Amendment standards cannot be tempered according to the degree of restraint imposed." *United States v. Columbia Broadcasting System, Inc.,* 497 F.2d 102, 105 (5th Cir. 1975);

In Re: The Adoption of Proposed Local Rule 17, supra, 339 So.2d at 184.

5. "Any direct restraint by government upon First Amendment freedoms of expression must be subjected by the courts to the closest scrutiny, and the government carries a heavy burden of showing justification for its imposition." *In Re: The Adoption of Proposed Local Rule 17,* 339 So.2d 181, 184; *Miami Herald v. McIntosh, supra,* p. 4; *New York Times v. United States* (1971), 43 U.S. 713.

6. The direct restraint imposed upon news gathering activities by the 1974 Amendment to Chapter 34, which prohibits electronic recording of conversations by reporters, protects no compelling state interest. A generalized interest in privacy, government secrecy or protection from injury to reputation is insufficient to impair news gathering activities. *Lucy Morgan v. State, supra; New York Times v. United States, supra; Time, Inc. v. Hill,* (1967), 385 U.S. 374.

7. "Where a restraint upon news gathering is justified by compelling state interest, the restraint must be specific and narrowly drawn and can be no broader than necessary to accomplish the desired goal." *U.S. v. CBS,* 497 F.2d 102, 106, (5th Cir. 1974); *In Re: The Adoption of Proposed Local Rule 17, supra,* 339 So.2d at 185; *NAACP v. Button,* 371 U.S. 415, 433; *Cantwell v. Connecticut,* 310 U.S. 296, 311. Here the "goal" or compelling state interest can only be discerned in a most general way although the statute prohibits conduct on a wholesale basis. For instance, the statute prohibits all electronic recording unless both parties give prior consent in all situations including those in which there is no

conceivable right or expectation of privacy such as in consumer fraud or official corruption. See *United States v. White*, 401 U.S. 745, 753 (1971). The 1974 Amendment is clearly too broad, and constitutes a constitutional impairment of First Amendment freedoms.

8. The 1974 Amendment to Chapter 934, Florida Statutes, that is Chapter 74-249, is declared to be unconstitutional as a prior restraint upon news gathering activities in violation of the First Amendment to the United States Constitution.

9. Violation of the provisions of Chapter 934, as amended by Chapter 74-249, is a criminal act. Chapter 74-249 contains words which cannot be interpreted in their natural sense and in their natural sense are virtually meaningless. As such, Chapter 74-249 is void for vagueness as a statute unlawfully chilling First Amendment freedoms. *Winters v. New York*, 1948, 333 U.S. 507.

10. A temporary injunction is therefore appropriate to enjoin the enforcement of Chapter 74-249, Laws of Florida.

APPENDIX C

IN THE SUPREME COURT OF
THE STATE OF FLORIDA

CASE NO. 50,938

ROBERT L. SHEVIN, as Attorney General,
and RICHARD E. GERSTEIN, as State Attorney,
Appellants,

-vs-

SUNBEAM TELEVISION CORPORATION, and
THE MIAMI HERALD PUBLISHING COMPANY,
Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is given that Sunbeam Television Corporation and the Miami Herald Publishing Company, Appellees in this case, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Florida upholding the constitutionality of Section 934.03(2)(d), Florida Statutes, which was entered in this action on October 28, 1977.

This Appeal is taken pursuant to 28 U.S.C. §1257(2).

/s/ Allan Milledge
Allan Milledge

MILLEDGE & HERMELEE
Attorneys for Sunbeam
Television Corporation
2699 South Bayshore Drive
Miami, Florida 33133
Telephone: (305) 858-5660

/s/ Parker D. Thomson
Parker D. Thomson

PAUL & THOMSON
Attorneys for The Miami Herald
Publishing Company
Southeast First National Bank
Building
Miami, Florida 33131
Telephone: (305) 371-2000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Notice of Appeal to the Supreme Court of the United States was mailed to: James D. Whisenand, Deputy Attorney General, State of Florida, The Capitol, Tallahassee, Florida 32304, and Thomas K. Peterson, Administrative Assistant, State Attorney's Office, Eleventh Judicial Circuit of Florida, 1351 N.W. 12th Street, Miami, Florida 33125, this 13th day of January, 1978

/s/ Allan Milledge
Allan Milledge

APPENDIX D

FLORIDA STATUTES

Portions of Original CHAPTER 934 (1969)

SECURITY OF COMMUNICATIONS

934.01 Legislative findings

On the basis of its own investigations and of published studies, the legislature makes the following findings:

(1) Wire communications are normally conducted through the use of facilities which form part of an intrastate network. The same facilities are used for interstate and intrastate communications.

(2) In order to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of interstate commerce, it is necessary for the legislature to define the circumstances and conditions under which the interception of wire and oral communications may be authorized and to prohibit any unauthorized interception of such communications and the use of the contents thereof in evidence in courts and administrative proceedings.

(3) Organized criminals make extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice.

(4) To safeguard the privacy of innocent persons, the interception of wire or oral communications when none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court. Interception of wire and oral communications should further be limited to certain major types of offenses and specific categories of crime with assurance that the interception is justified and that the information obtained thereby will not be misused.

934.02 Definitions

As used in this chapter:

(1) "Wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception, furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of intrastate, interstate or foreign communications;

(2) "Oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

(3) "Intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device;

(4) "Electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than:

(a) Any telephone or telegraph instrument, equipment or facility or any component thereof furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business, or being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) A hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(5) "Person" means any employee or agent of the state or political subdivision thereof and any individual, partnership, association, joint stock company, trust, or corporation;

(6) "Investigative or law enforcement officer" means any officer of the state or political subdivision thereof or of the United States who is empowered by law to conduct investigations of, or to make arrests for, offenses enumerated in this chapter or similar federal offenses and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

(7) "Contents," when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

(8) "Judge of competent jurisdiction" means justice of the supreme court, judge of a district court of appeal, circuit judge, or judge of any court of record having felony jurisdiction of the state;

934.03 Interception and disclosure of wire or oral communications prohibited

(1) Except as otherwise specifically provided in this chapter, any person who:

(a) Willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire or oral communication;

(b) Willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when:

1. Such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

2. Such device transmits communications by radio or interferes with the transmission of such communication;

(c) Willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection; or

(d) Willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be guilty of a felony of the third degree, punishable as provided in §775.082, §775.083, or §775.084.

(2) (a) It is not unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication; provided, that said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(b) It is not unlawful under this chapter for an officer, employee, or agent of the federal communications commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the commission in the enforcement of 47 U.S.C. ch. 5,[1] to intercept a wire communication or oral communication transmitted by radio or to disclose or use the information thereby obtained.

---

[1]47 U.S.C.A. §151 et seq.

(c) It is not unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication when such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It is not unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication when such person is a party to the communication or when one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal act.

APPENDIX E

SECURITY OF COMMUNICATIONS— AUTHORIZED INTERCEPTIONS

CHAPTER 74-249

SENATE BILL NO. 459

An Act relating to security of communications; amending §934.02(2), Florida Statutes, 1972 Supplement, defining oral communication; amending §934.03(2)(c) and (d), Florida Statutes, to authorize interception of wire or oral communications by law enforcement officers or persons acting under the direction of a law enforcement officer with consent of only one party for the purpose of obtaining evidence of a crime; to authorize interception of wire or oral communications when all parties to the communication have given prior consent to such interception; creating section 934.03(2)(e), Florida Statutes, to authorize interception of obscene, harassing or threatening wire communications when requested by the recipient of the communication; deleting references to color of law; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (2) of section 934.02, Florida Statutes, 1972 Supplement, is amended to read:

934.02 Definitions

As used in this chapter:

(2) "Oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, and does not mean any public oral communication uttered at a public meeting;

Section 2. Paragraphs (c) and (d) of subsection (2) of section 934.03, Florida Statutes, are amended to read:

934.03 Interception and disclosure of wire or oral communications prohibited

(2)

(c) It is lawful under this chapter for a law enforcement officer or a person acting under the direction of a law enforcement officer to intercept a wire or oral communication when such person is a party to the communication or one of the parties to the communication has given prior consent to such interception and the purpose of such interception is to obtain evidence of a criminal act.

(d) It is lawful under this chapter for a person to intercept a wire or oral communication when all of the parties to the communication have given prior consent to such interception. It is unlawful to intercept any communication for the purpose of committing any criminal act.

Section 3. Paragraph (e) of subsection (2) of section 934.03, Florida Statutes, is created to read:

(e) It is lawful under this chapter for an employee of a telephone company to intercept a wire communication for the sole purpose of tracing the origin of such communication when the interception is requested by the recipient of the communication and the recipient alleges that the communication is obscene, harassing or threatening in nature. Provided that the individual conducting the interception shall notify local police authorities within forty-eight hours after the time of the interception.

Section 4. This act shall take effect October 1, 1974.

Approved by the Governor June 18, 1974.

Filed in Office Secretary of State June 19, 1974.

APPENDIX F

Portions of CHAPTER 934 As Amended (October 1974)

SECURITY OF COMMUNICATIONS

934.01 Legislative findings

On the basis of its own investigations and of published studies, the legislature makes the following findings:

(1) Wire communications are normally conducted through the use of facilities which form part of an intrastate network. The same facilities are used for interstate and intrastate communications.

(2) In order to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of intrastate commerce, it is necessary for the legislature to define the circumstances and conditions under which the interception of wire and oral communications may be authorized and to prohibit any unauthorized interception of such communications and the use of the contents thereof in evidence in courts and administrative proceedings.

(3) Organized criminals make extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice.

(4) To safeguard the privacy of innocent persons, the interception of wire or oral communications when none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court. Interception of wire and oral communications should further be limited to certain major types of offenses and specific categories of crime with assurance that the interception is justified and that the information obtained thereby will not be misused.

934.02 Definitions

As used in this chapter:

(1) "Wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception, furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of intrastate, interstate or foreign communications;

(2) "Oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation and does not mean any public oral communication uttered at a public meeting;

(3) "Intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanic, or other device;

(4) "Electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than:

(a) Any telephone or telegraph instrument, equipment or facility or any component thereof furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business, or being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) A hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(5) "Person" means any employee or agent of the state or political subdivision thereof and any individual, partnership, association, joint stock company, trust, or corporation;

(6) "Investigative or law enforcement officer" means any officer of the state or political subdivision thereof or of the United States who is empowered by law to conduct investigations of, or to make arrests for, offenses enumerated in this chapter or similar federal offenses and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

(7) "Contents," when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

(8) "Judge of competent jurisdiction" means justice of the supreme court, judge of a district court of appeal, circuit judge, or judge of any court of record having felony jurisdiction of the state;

(9) "Aggrieved person" means a person who was a party to an intercepted wire or oral communication or a person against whom the interception was directed.

934.03 Interception and disclosure of wire or oral communications prohibited

(1) Except as otherwise specifically provided in this chapter, any person who:

(a) Willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire or oral communication;

(b) Willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when:

1. Such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

2. Such device transmits communications by radio or interferes with the transmission of such communication;

(c) Willfully discloses, or endeavors to disclose, to any other person the contents of any wire or oral communication, knowing or having reason to know that the

information was obtained through the interception of a wire or oral communication in violation in this subsection; or

(d) Willfully uses, or endeavors to use, the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection;

shall be guilty of a felony of the third degree, punishable as provided in §775.082, §775.083, or §775.084.

(2)(a) It is not unlawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of any communication common carrier whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the carrier of such communication; provided, that said communication common carriers shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(b) It is not unlawful under this chapter for an officer, employee, or agent of the federal communications commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the commission in the enforcement of 47 U.S.C. ch. 5,[1] to intercept a wire communication or oral communication transmitted by radio or to disclose or use the information thereby obtained.

(c) It is lawful under this chapter for a law enforcement officer or a person acting under the direction of a law enforcement officer to intercept a wire or oral communication when such person is a party to the communication or one of the parties to the communication has given prior consent to such interception and the purpose of such interception is to obtain evidence of a criminal act.

(d) It is unlawful under this chapter for a person to intercept a wire or oral communication when all of the parties to the communication have given prior consent to such interception.

(e) It is unlawful to intercept any communication for the purpose of committing any criminal act.

(f) It is unlawful under this chapter for an employee of a telephone company to intercept a wire communication for the sole purpose of tracing the origin of such communication when the interception is requested by the recipient of the communication and the recipient alleges that the communication is obscene, harassing, or threatening in nature. The individual conducting the interception shall notify local police authorities within forty-eight hours after the time of the intereception.

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Jurisdictional Statement and Appendix were served this 26th day of January, 1978, by placing same in the United States mail, first class postage, upon: James D. Whisenand, Deputy Attorney General, State of Florida, The Capitol, Tallahassee, Florida 32304; Thomas K. Peterson, Administrative Assistant, State Attorney's Office, 11th Judicial Circuit of Florida, 1351 N.W. 12th Street, Miami, Florida 33125; and Thomas W. McAliley, Beckham, McAliley and Proenza, P.A., Fifth Floor, Concord Building, 66 West Flagler Street, Miami, Florida 33130.

Allan Milledge